No. 11282.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the use of RECONSTRUCTION FINANCE CORPORATION, a federal corporation, acting in behalf of DEFENSE PLANT CORPORATION, a federal corporation,

Appellant,

vs.

SAM BLOCK,

Appellee.

BRIEF OF APPELLEE, SAM BLOCK.

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Statement of Case.

While the statement of the appellant is in the main correct, we believe it necessary to enlarge thereon to some extent in order to properly present and view the background of the questions raised by the appellant. We will endeavor, insofar as possible not to duplicate appellant's statement.

On September 18, 1942, the Reconstruction Finance Corporation adopted a resolution for acquiring certain "lands" for a "gas storage reservoir" and for the necessary proceedings to acquire the "lands" therein described [R. 72]. On October 19, 1942, an amendment providing for the execution of a declaration of taking of said "lands"

and estimating the just compensation to be paid therefor, was adopted [R. 73].

Possession was taken of the "lands" under order for immediate possession which described only "real property" [R. 11]. Possession was taken of said "lands" *including* certain oil wells thereon and all personal property, fixtures, machinery, equipment, derricks, casing, tubing in the wells and pumping machinery on September 28, 1942 [R. 33]. No machinery, equipment or personal property was described in either of the above referred to resolutions. Complaint in condemnation was filed on September 28, 1942 [R. 10]. The complaint recited the purpose and necessity of the taking, to-wit: "The establishment of a reservoir for the storing in conservation of natural gas" [R. 5 and 6]. It was alleged that the interest sought to be acquired was "full fee simple title" and consisted of lots, pieces or parcels of land situate in the County of Los Angeles, etc. (describing the land but not the improvements, trade fixtures or personal property situate thereon) [R. 6].

About one year later and on October 4, 1943, the R. F. C. adopted an amendatory resolution covering "machinery and equipment" [R. 276]. (Said resolution did not enumerate "structures and improvements attached to the land" as stated by the appellant on page 4 of its brief).

On January 12, 1944, an amended complaint was filed [R. 31], seeking to acquire fee simple title to the real property described in the original complaint, and in addition to acquire "all personal property and trade fixtures located on said real property" [R. 26]. [Ex. C, R. 33 to 41] attached to the amended complaint, described the machinery and equipment as "materials and supplies taken

over by Defense Plant Corporation September 29, 1942, Block Oil Co." etc.

The appended description or inventory is long and contains many items such as nipples, ells, valves, gas engines, bushings, derrick, sucker rods, tubing, casing, etc. and such other miscellaneous items of personal property as are usually found on oil wells [R. 33-41]. Incidentally, the above list inadvertently omitted two 1000 bbl. storage tanks which were located on the property and taken [R. 136-137].

It was alleged in the amended complaint that the property sought to be acquired by the action included the following: "all pipe, machinery, appliances, equipment, tanks, structures, tools, supplies and all other property whether real or personal which were located upon any of said tracts of land, herein above described, on September 28, 1944 and which on said day were used, or were useful in the operation of any oil or gas wells, etc. thereon, or, in the treating or storing etc. of the products of such wells" [R. 27 and 28].

It was alleged in substance in paragraph XIV of the amended complaint [R. 28] that the plaintiff was unable to determine how much of the property was deemed to be a part of the real property on which it was located for the reason that the plaintiff did not know the terms of the oil and gas leases under which the property was placed on the premises, etc.; and "that plaintiff therefore designated *all of* said property as *personal property* and trade fixtures solely for the purpose of identifying the same as part of the property taken" and would ask leave of Court to amend the complaint accordingly *"if and when it shall be ascertained that any of the property 'herein'*

designated as personal property and trade fixtures is in fact part of the realty upon which it is located." [See paragraph XIV Am. Comp. R. 28.]

No such amended complaint was ever filed and no designation was made contending that any of the personal property or trade fixtures were in fact part of the realty.

Defendant Block answered [R. 41], alleging that the oil and gas lease which he held, had a market value of $35,000.00; that an overruling royalty interest in the property he held was worth $6,500.00; and that the personal property and trade fixtures owned by him had a market value of $20,401.01.

Defendant denied that the resolution of the R. F. C. of September 18, 1942, determined to take the personal and mixed property described in the amended complaint and denied that there was any authority for the taking of possession of the same until October 24, 1943.

On the issues so tendered appellant made no proof as to the type and kind of machinery, equipment, tools or supplies sought to be condemned other than as disclosed by the inventory [Exhibit "C"] attached to the amended complaint. Nor was there proof as to whether such items were fixtures, trade fixtures, real or personal property. The only proof which may be deduced from the record is the fact that the part of the equipment was used to produce oil from the oil well located upon appellee's lease. *In short, appellant made no proof to support the allegations of paragraphs XIII or XIV of the amended complaint.*

It was stipulated, that the base lease from the fee owner to the original lessee under whom appellee held, provided

in substance, that the lessee after having the right to explore and develop for oil, also had the right to remove "during or after the term any and all improvements placed or erected on the premises by the lessee, including the right to pull all casing" [R. 97]. [See also R. 199.]

It likewise appears that upon termination of the sublease (held by appellee) lessee was given 30 days thereafter to remove any personal property and equipment placed upon the premises [R. 123].

It appears also from the testimony, which is not disputed, that it is common practice in the oil industry for oil well equipment such as derricks, tubing, rods and casing to be moved from one well to the other [R. 173].

It appears further that the equipment and machinery was considered to be personal property by witnesses for both appellant and appellee [see R. 135 testimony of appellee]. Appellant's expert, the witness Oliver testified that the "facilities that are considered a part of the personal property of the well had to be maintained on the premises during the period that the anticipated life of the well had been contemplated in these valuation reports" (as given by the witnesses) [R. 305].

It was further shown that all of the equipment could be removed from the well and well site, in the ordinary course of business, and would be so removed upon abandonment, except as to 800 or 900 feet of the surface casing [R. 223-224].

Appellee testified, *without objection,* that the market value of the leasehold, subject to land owners' royalty and overriding royalty, was $35,000. which valuation did not include personal property and fixtures [R. 139].

He likewise testified, *without objection,* that the personal property and fixtures described in Exhibit "C" including two storage tanks which were omitted from the Exhibit and which were taken, was of the reasonable market value of $22,000. [R. 139.] On cross-examination, appellee testified as to separate valuations on separate items of the equipment which included two 1,000 bbl. tanks, placing a value of $1500 for the tanks, and $4,000. for the derrick [R. 162-163], valuing the tubing at 35¢ per foot (there were 6487 feet of tubing). The appellee had long been engaged in the business, buying and selling this type of equipment [R. 138].

Appellee's witness, Crown, testified, *without objection by the appellant,* that the fair market value of the *leasehold, not including* personal property and fixtures located thereon, was approximately $11,000 [R. 185, also R. 262].

The testimony of the appellee's witnesses, Rush and Rubin, as to the value of the machinery and equipment, was admitted over objection as set forth in the appellant's brief. G. R. Rush testified that his valuations were based upon an "as is" condition of the equipment [R. 228] and that there was no substantial difference of value between October, 1943 and September 28, 1942 (see also testimony of appellant's witness Oliver on direct examination) [R. 320].

On cross-examination, the witness Oliver testified that the replacement value of the equipment on September 28, 1942, was $19,846.85 [R. 365].

The appellant's witness Wents, upon cross-examination, testified as to the market value of tubing, ⅞" sucker rods,

¼" sucker rods, 7 " casing, 5¾" liners, and the derrick. The aggregate value of the above items as given by Mr. Wents being approximately $13, 858.88 [R. 406 to 409]. This did not include many other items listed on Ex. C but only the major items.

In addition to the instruction to the jury contained on page 9 of appellant's brief, the Court instructed the jury as follows: "the inquiry in all such cases as to the uses of the property in relation to market value is: What is the property worth in the open market viewed not merely with reference to the use to which it is at the time applied, but with reference to the uses for which it is adapted; that is to say, what is it worth from its adaptability for all uses, having regard to the existing wants of the community and such wants as reasonably may be expected in the immediate future, and in this connection, you may take into consideration all of the uses for which the property is reasonably adaptable, including its particular fitness for particular purposes when such evidence for such purposes forms a factor in determining market value. In determining the market value of the property here involved, you may consider its location and environment and the character and nature of the developments surrounding it, its characteristics, its accessibility or lack thereof, and any and all physical factors that may in any way affect its adaptability and therefore its value on the open market." [R. 484.]

The verdict was returned and judgment entered thereon as set forth in appellant's brief. Motion for a new trial was denied.

No question has been raised as to the above instructions.

I.

There Was No Error in Admitting Evidence of Separate Value of the Oil Well Improvements, Trade Fixtures and Personal Property.

(a) Under the facts of the case the court's ruling was proper.

(b) The issue of separate value was tendered by the amended complaint and the amended answer.

(c) The proof discloses that the highest and best use of property taken was the removal and sale of the personal property and trade fixtures. Separate value of the latter was proper upon this issue.

A.

Under the Facts of the Case, the Admission of the Challenged Testimony Was Proper.

In discussing the specifications of error raised by appellant, we shall first consider the contention that there was error in the admission of testimony of appellees witnesses of separate value as to the trade fixtures, machinery and equipment and personal property located on the leasehold. It is our contention that under the facts of this case, no error occurred, and further that the testimony of appellant's own witnesses contains evidence of separate value, and that such testimony was proper and necessary to arrive at the fair, just and reasonable market value of the property taken from appellee.

The law clearly recognizes that in the field of eminent domain, factual situations may exist wherein it becomes necessary to depart from the general rule as stated by

appellant as to the admissibility of testimony of value and that such departure may be proper and the only fair and equitable method of arriving at the fair market value and just compensation to be paid to a condemnee.

In this case, the appellee was the owner of an oil and gas leasehold estate and the trade fixtures and personal property located thereon. Both were taken by the condemnation proceedings (as well as the fee title to the real property). The leasehold of the appellee being an oil and gas lease was a profit *a prendre,* that is, an incorporeal heriditament or an interest in real property, *Laguna Beach v. Dodge,* 18 Cal. (2d) at 135, 114 P. (2d) 351. Under it, he had the right to enter upon the property and extract and remove therefrom oil, gas and other hydrocarbon substances and reduce the same to possession and ownership. The leasehold estate embraced a proven oil field having a known oil reservoir and known production. That such leasehold estate including the right of removal of the oil and gas had a market value can not be disputed. The right of removal of the oil and gas was taken from appellee by appellant. In addition, the right of appellee, under his lease, to remove trade fixtures and personal property owned by him and used by him on the lease, was taken from him. Such latter right could have been exercised by appellee during the term of his leasehold estate, *and incidentally by the condemnor* after seizure.

The appellee's bare right to enter upon the land and to take and extract the oil, had a market value without the existence thereon of production equipment. A well had already been drilled and was in being. It required no additional drilling expense to tap the oil reservoir in order to exercise the right of removal. Also, appellee's trade

fixtures and personal property which were removable by him had a definite market value upon the date of the taking of possession thereof by the appellant.

Appellant's testimony gave the value of both the leasehold estate and the personal property as approximately $5650. Such valuation was arrived at by estimating the potential life of the well and production of the well, less the cost of recovering the oil, less a discount of the net return from the sale of the oil on a 10-year basis, plus the salvage value of the fixtures and machinery *at the time of the termination* of the estimated *life of the well* ten years hence. [R. 301 to 306.] No consideration was given to the *present going* market value of the trade fixtures and personal property nor to the question of what a buyer who had the right of removal of such trade fixtures upon purchase of the lease would be willing to pay therefor as of the date of the taking. The evidence discloses that the "as is" value of said fixtures and equipment as of the date of the taking was nearly $18,000 and there is little variance between the testimony of the appellant and the appellee upon this phase. This latter figure does not take into consideration the market value of the leasehold estate, *i. e.,* the profit a prendre or the right to enter upon the land, extract the oil and reduce the same to possession and ownership.

Appellee was entitled to have the jury consider the highest and best use to which the property condemned could be put in order to determine the fair market value thereof. The evidence herein discloses that the highest and best use at the date of the taking from a dollars and cents standpoint would be the removal of the trade fixtures from the well and the sale thereof, which would result in a return

of between $12,000 and $18,000. It is thus clear that appellee could have realized upon the open market for his equipment alone more than three times the sum that the appellant states is the reasonable market value of both the leasehold *and* the fixtures and personal property.

In the final analysis, appellant seeks to acquire the fixtures and personal property on a valuation basis, *not* as of the date of the taking, but rather as of ten years hence and after they had been used for that period by the condemnor and then only upon payment of salvage or junk value. This all too clear fact cannot be eliminated by appellant by saying that the trade fixtures and personal property is part of a "going concern" and hence it was required only to pay salvage value ten years hence, especially where appellant could have shut down the well upon taking possession and sold the equipment at its then market value.

It is, we assert, entirely unreasonable and unjust to apply such an unrealistic mathematical formula as used by appellant, to the valuation of condemned property and say in one breath that the reasonable market value is some $5600 and in the next breath say that a part of the property could be removed from the premises and sold upon the open market for nearly $18,000.00. Would any man maintain $18,000.00 worth of personal property and trade fixtures upon real property having the then right to remove same, and continue to use them in the process of producing goods or wealth, with the expectation of earning $5600.00 over a period of ten years and at the end of said ten year period, have the value of said trade fixtures and personal property reduced to a normal or junk value? That is the appellant's position in the instant case.

In this respect, it is submitted that the appellant has vitally misconceived the *just* compensation to be paid to a condemnee.

In *Joint Highway Dist. etc. v. Ocean Shore,* 128 Cal. App. 752, 18 Pac. (2d) 413 the court says:

> "In San Diego Land etc. v. Neal, 78 Cal. p. 63 20 Pac. 372. The court said at page 67:
>
> "The word 'value' is used in different senses. Bouvier, in his definition, says: 'This term has two different meanings. It sometimes expresses the utility of an object and sometimes the power of purchasing goods with it. The first may be called the *value in use,* the latter the value in exchange.' For the purposes of the law of eminent domain, however, the term has reference to the *value in exchange, or market value.*" (Italics ours.)

Also, in Black's Law Dictionary we find the following:

> "Value. The utility of an object in satisfying, directly or indirectly, the needs or desires of human beings, called by economists 'value in use'; or its worth consisting in the power of purchasing other objects called 'value in exchange'." The distinction between value in use and value in exchange or market value has been generally recognized by the courts and it is well settled that it is the market value which governs in proceedings in eminent domain and not the value in use to either the owner or condemnor."

Appellant has cited section *1246.1* of the *Calif. Civil Code of Procedure* to the effect that a condemnor is entitled to have the value of the whole determined in advance of its apportionment among the various condemnees.

We do not quarrel with such proposition but point out that such section of the *Calif. Civil Code of Procedure,* by its express terms, provides "where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have amount of the award for said property first determined as between plaintiff and *all* defendants claiming any interest therein" etc.

In the instant case, there are not two or more estates or divided interests involved. Only the leasehold estate of the appellee together with the trade fixtures and personal property located thereon were taken, and no person, other than appellee claims to have any right or interest therein or to be entitled to any portion of the award. The interest of lessor, or the fee had been taken and payment made therefore. Clearly such section is not authority for appellant's position.

Appellant cites and relies upon *City of Los Angeles v. Klinker,* 219 Cal. 198, 198 P. (2d) 826, as authority for the proposition "that evidence of separate values is not proper." Careful examination of that case discloses, however, that the California Supreme Court clearly recognized that the rule is not one of universal application. In reality, the case supports appellee's position that evidence of separate valuations under certain circumstances, are proper.

The cited case involved the condemnation of the old Times Building in Los Angeles, California. The evidence disclosed that certain printing and processing equipment and presses had been *especially designed for that building when it was built.* The owner contended that the same was therefore a part of the realty and that he must be compensated therefore by the condemnor.

The condemnor on the other hand contended that the processing equipment and machinery, etc. was personalty and that the same was not being taken and that no award should be made therefor.

The dispute turned upon the point as to whether or not such machinery and equipment were fixtures under the California law. The court determined that under the facts of the case, the same were fixtures and realty and that the owner was entitled to compensation therefor. In the course of the opinion the Supreme Court said:

> "The market value of the land together with the improvements theron, viewed as a whole and not separately, is the general rule (Vallejo v. Home Sav. Bank, 24 C. A. 166) *exceptions to this general rule might be allowed where under peculiar circumstances not here present, as by reason of the nature of the improvement itself, no other criterion would be appropriate for establishing the market value of the property other than the structural value or the reconstruction cost. The case of Joint Highway District No. 9 v. Ocean Shore R. R. Co.,* 128 C. A. 747 seems to be an illustration of the exception." (Italics ours.)

In the *Ocean Shore Railway* case cited in the *Klinker* case, the court said:

> "Appellant further states that the market value cannot be based upon cost of reproduction plus appreciation less depreciation. There is some conflict of authority on the question of the admissibility of evidence to show such cost of reproduction, but we believe that when it appears that property is improved so as to make it peculiarly adaptable for its highest available use and that there may be said to be

> a market for the property for such use, the cost of reproduction of such improvements becomes a factor in the determination of market value and to that extent, the opinions of witnesses may be based on such cost. This does not mean, however, that such cost upon reproduction is the market value of the land for other factors including demand, enter into the ultimate determination of market value."

Appellant likewise relies upon the case of *U. S. v. Becktold,* 129 F. (2d) 473 (C. C. A. 8). That case clearly sustains the appellee's position herein. The facts of the case were in substance as follows: Condemnation was sought of certain real estate on which there was located a building containing a bookbindery, with the machinery and processing equipment necessary therefor. The government contended that it was liable to pay only for the land and buildings without compensation for the machinery. Defendant contended that it was entitled to compensation for the equipment and machinery as well. The court determined that the machinery was a fixture and part of the realty under the law of the State of Missouri (as in the *Klinker* case, *supra*). The plaintiff condemnor objected to evidence of the defendant as to separate valuations upon the machinery and processing equipment. The court held such evidence was properly received, saying:

> ". . . As a part of its proof to establish the value of the property taken, defendant offered testimony of certain experts as to the cost of reproduction, less depreciation. In some instances the testimony dealt only with the building proper, while in other instances the testimony dealt with the fixtures, and it is insisted that this permitted a recovery of separate

items, additional to the market value of the land. There was opinion evidence as to the value of the entire structure, including land, building and fixtures. There was an appraisal by an appraising company, which in addition to fixing a total value of the property as a whole, gave detailed appraisals of the various elements which went into this valuation. Corroborative of the valuation of the property as a whole, that there was evidence as to the cost of reproduction of the building and fixtures, less depreciation. We have already held that both the building and the fixtures constituted part of the realty. The property taken was the land as enhanced by the value of structures and fixtures. Manifestly, evidence as to the cost of reproduction, less depreciation, was proper evidence to be taken into consideration by the jury in determining the value of the property as a whole. Thus, in Banner Mill Co. v. State, 240 N. Y. 533, 148 N. E. 668, 41 A. L. R. 1019, it was held that in ascertaining the fair market value of land upon which a flour mill was situated, the court might consider not only the cost of production but all the costs necessarily or reasonably expended in bringing the mill into effective working condition, all to be weighed with the other evidence of value; that all the uses that could be made of the property might be considered, as well as the value of the plant as a live, going flour mill, and the increased value, if any, which the structure as used had given to the land, and all the valuable appurtenances and availabilities of the property. . . ."

And again, at page 478:

"A market value could scarcely have been established, and as said by this court in Hart & Rand v. Biston Coffee Co., 41 F. (2d) 625: 'Where value

is an issue the inquiry may properly be allowed to take a wide scope. Evidence of the cost, selling price, replacement value, location of the property, local demand for it, and many other things may be shown. Many elements properly enter into the determination of "fair value," and evidence bearing on the question may be admissible, although it may have but little weight.'

"It is urged by plaintiff that the Missouri courts have held to the contrary, and in support of that contention the case of City of St. Louis v. Turner, 331 Mo. 834, 55 S. W. (2d) 942, 944, is relied on. In that case the court said that all the testimony was to the effect that the building was obsolete and not adapted to the character of the land. But the court said that, 'It is true that where the character of the structures is well adapted to the kind of land upon which they are erected, the cost of the buildings and fixtures, after making proper deductions for depreciation by wear and tear, may be a reasonable test of the amount by which they enhance the market value of the land.'

"The cases of Devou v. City of Cincinnati, 6 Cir., 162 Fed. 633, and United States v. Meyer, 7 Cir., 113 F. (2d) 387, are also relied on by the plaintiff, but in the Devou case the court does not hold such evidence inadmissible in all cases but that it was inadmissible in that case. In the course of the opinion it is said: 'There may be cases where it is proper enough to permit testimony as to the value of the building separate from the land, and all the land separate from the building, where from such evidence the jury can reach the fact which it is to ascertain, namely, the market value of the land including the building.' (162 F. 636.)

"The Meyer case dealt with timber land, and the court correctly held that separate valuation of the timber would be improper.

"Value of structures and fixtures constituting a part of the realty to be taken may be shown as an aid to the jury in finding the value of the real estate and in fixing just compensation for the whole property. City of Baltimore v. Himmel, 135 Md. 65, 107 A. 522; *In re* Blackwell's Island Bridge, 198 N. Y. 84, 91 N. E. 278, 41 L. R. A., N. S., 411, 139 Am. St. Rep. 791; Banner Mill Co. v. State, *supra;* Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 P. 498, 94 Am. St. Rep. 864. *In re* Blackwell's Island Bridge, *supra* (198 N. Y. 84, 91 N. E. 279, 41 L. R. A., N. S., 411, 139 Am. St. Rep. 791), the court, among other things, said:

" 'But when a building has an intrinsic value, which must be added to the value of the land in order to ascertain the value of the whole, the owner may not be able to establish his just compensation unless he is permitted to prove the value of his land as land and the value of his buildings as structures. By adding to each other these two quantities the result is really the value of the land as enhanced by the buildings thereon.' "

In this case it is submitted, the owner would be unable to prove his just compensation, unless he be permitted to prove the value of trade fixtures and personal property as such, and the value of leasehold as such as of the date of seizure. He should not be limited to proof of value of leasehold and trade fixtures, based upon an *income return alone* of both over a period of years, and have his trade fixtures valued on that basis. He should

be allowed to prove the value of such trade fixtures on the open market as of *the date of the taking.*

Where land is improved and the improvements have an intrinsic value which must be added to the land in order to ascertain the market value of the whole, evidence of separate value of the improvements is admissible. *Linesh v. Board of Ed.,* 13 Ohio App. 161; *Hall v. City of Prov.,* 45 R. I. 167-121 Atl. 66; *State v. Carpenter,* 126 Tex. 604-89 S. W. (2d) 979; *Campbell v. New Haven,* 101 Conn. 173, 125 Atl. 650; *N. Y. Central v. Maloney,* 234 N. Y. 208, 137 N. E. 305; *Board of Comm. v. Goode,* 44 N. M. 495, 10 Pac. (2d) 470; *In re Water Front,* 219 N. Y. S. 353, 219 App. Div. 27; *Foley v. Houston Belt Co.,* 50 Texas Civil Appeals 218, 110 S. W. 96; *Banner Mill Co. v. State,* 240 N. Y. 533, 148 N. E. 668 (Certiorari denied 269 U. S. 582, 70 L. Ed. 423).

We have searched diligently for authorities involving the condemnation of oil producing property and leasehold estates similar to the one at bar. We have found no case on all fours. In view, however, of the statements of the courts hereinabove quoted, we earnestly urge that testimony of separate value under the facts of this case was properly admissible and was the only fair, just and reasonable method of arriving at true, reasonable market value of that of which appellee was deprived.

Furthermore, evidence of separate value of the lease without the trade fixtures and equipment was received without objection. [R. 139, leasehold; R. 139, trade fixtures, etc.; R. 162-3; R. 185 and 262, leasehold alone.]

We think the statement contained in *Jones v. Evidence* (Civil cases), 4th Ed., Chap. V, Sec. 168, pages 294-295, with reference to condemnation proceedings, is highly pertinent:

> *"In condemnation proceedings* and proceedings to recover compensation for lands taken or damaged, it is perhaps the majority rule to determine questions as to relevancy liberally and *to resolve doubts as to admissibility in favor of the facts offered in evidence rather than against them."* (Italics ours.)

B.

The Issue of Separate Value Was Tendered by Both the Amended Complaint and the Amended Answer.

As we have heretofore pointed out, the amended complaint alleged in paragraph XIII thereof [R. 27]

> "that the property which plaintiff by this action intends and seeks to take, acquire and condemn, hold and own, includes the following:
>
> "(b) All pipe, machinery appliances, equipment, tanks, structures, tools, supplies and all other property, whether real or personal, which were located in or upon any of said tracts of land hereinabove described, on the 28th day of September, 1942, and which on said day were used, or were useful in operation of any oil or gas wells upon and in said parcels of land or in the treating, storage or disposing of the products of any such wells."

Paragraph XIV of the amended complaint [R. 28] alleged in substance that the plaintiff was unable to determine how much of the property described in paragraph XIII, "is deemed to be part of the real property on which it is located," for the reason that plaintiff did not know

the terms of the oil and gas leases under which the property was placed upon the premises for the purpose of producing oil or gas therefrom; that plaintiff

> "therefore designates all of said property as personal property and trade fixtures solely for the purpose of identifying the same as part of the property taken and will amend the complaint accordingly if and when it be ascertained that any of the property herein designated as personal property and trade fixtures *is in fact part of the realty.*" [R. 27.]

The amended answer of the appellee alleged that he was the owner of certain personal property or trade fixtures affixed to or used in connection with the oil well and that the reasonable value of the same was the sum of $20,401.01; that by reason of the taking of the same, he had been damaged in that sum. [R. 43.]

Appellant filed no amendment to the amended complaint as was contemplated by paragraph XIV hereinabove quoted. Therefore the case must be deemed to have proceeded upon the theory that the property described in paragraphs XIII and XIV *was not in fact a part of the realty*. Appellee, in view of the failure to amend by the appellant, was entitled to proceed to trial upon the theory that said property was personalty, and accordingly tended issue upon that premise. Under the issue so framed, appellee was fully justified in offering testimony as to the value of said personalty, and appellant cannot now complain of any error in the admission of such testimony as being prejudicial to it. Furthermore, the inventory [Ex. C. to the amended complaint, R. 33] listed property as "materials and supplies taken over

by Defense Plant Corporation on September 29, 1942." Thus having framed the issues, appellant cannot now complain that the jury was permitted to hear evidence of the value of such "materials and supplies" or "property not herein designated in fact as a part of the realty upon which it is located."

C.

Under the Facts Proven the Highest and Best Use to Which Property Could Be Put Was Removal From the Oil Well of the Trade Fixtures and Personal Property and Their Sale Upon the Open Market. Proof of Value of Same Was Proper Upon Such Issue.

We think it indisputable that in determining the amount of the award, the jury was entitled to consider the uses to which the property was adapted, that is to say, what was its worth from its adaptability for *all uses*. The court so properly instructed the jury. [R. 484.]

Matters which anyone contemplating the purchase might take into consideration in determining its value, are proper to be laid before the jury in determining the value of the property sought to be condemned. *City of Stockton v. Vote,* 76 Cal. 405, 244 Pac. 609; *Spring Valley v. Drinkhouse,* 92 Cal. 528, 28 Pac. 681; *City of Sacramento v. Heilbruen,* 156 Cal. 408, 104 Pac. 979.

Thus the market value may be greater or less than the value *in use* to either the owner or the condemnor, but in the eyes of the law, it is a fixed amount determined by the highest sum which the property is worth to persons generally purchasing in the open market in consideration of the property's adaptability to any proven use. *Joint Highway District No. 9 v. R. R. Co.,* 128 Cal. at 755, 18 Pac. 413; *San Diego v. Neale,* 78 Cal. 73.

The theory of the appellant's witnesses upon value was based upon "the value in use." Whereas the "value in exchange or market value" should govern. (See *San Diego v. Neale, supra.*)

We think the entire situation is eloquently expressed in *U. S. Becktold,* 129 F. (2d) 472, wherein it was said:

> "as was said by the Court of Appeals of New York in Jackson v. New York, 213 N. Y. 34, 106 N. E. 758, L. R. A. 1915D 492 Ann. Cas. 1916C 779, speaking through Judge Cardozo, now Mr. Justice Cardozo:
>
> " 'Condemnation' is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of secondhand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value. An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures, and so it has frequently been held.' "

In the instant case it is clear that the machinery severed from the oil well commanded a substantial value in the open market. According to the appellant's theory attached to the going oil well it had little or no value. In other words, the situation is the converse of the situation

commented upon by Mr. Justice Cardozo. It would be just as intolerable that the State condemn the lease with valuable machinery and equipment thereon which could be immediately removed by the State and sold for a substantial sum, giving the owner only the junk value of the machinery computed, not as of the date of the taking, *but as of ten years hence.*

To paraphrase the language of Judge Cardozo,

> "the law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit the elements of value to suit the present day value of his machinery and equipment"

by the placing thereon of a valuation as junk value only after it had become worn out or depleted by a long term use by the condemnor, and seeking only to pay such junk value, or by placing valuation thereon only in connection with a producing oil well, based solely upon the income of such well. Yet that is exactly what appellant would have this court do.

In determining the market value of the property condemned for public purposes, the same conditions are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is at the time plainly adapted; that is to say, what is it worth from its availability for all purposes. The property is not to be deemed worthless because the owner allowed it to go to waste or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities and conveniences of life.

The owner must be compensated for what is taken from him but that is done when he is paid its fair market value for all available uses and purposes.

Shoemaker v. U. S., 147 U. S. 379;

U. S. v. Chandler, 229 U. S. 53, 81, 57 L. Ed. 1063, 1082;

Orgel, Valuation Under Eminent Domain, page 56.

II.

The Verdict and Judgment Thereon Are Supported by the Evidence.

It is appellee's position that the testimony of the appellant's witnesses, alone, is sufficient to support the verdict. When the above evidence is coupled with the remaining testimony in the case, the propriety of the verdict becomes even more apparent.

The nub of appellant's argument is found on pages 38 and 39 of its brief wherein it is argued that in case of property such as this, "the only enjoyment lies in realization of income," the value of which cannot be measured by the cost of replacement of a portion thereof when a realizable maximum return is less." In other words, "value in use" and not value "in exchange or market value" must govern. Further, it is argued that if the award for the lease is to be supported by any theory of *immediate* rather than deferred salvage of the equipment, that it necessarily follows *that no* allowance can be made for the oil, since, the equipment being removed, no oil can be recovered. By such statement we assume that appellant's position is that the leasehold estate has no value

in the absence or the presence of production equipment thereon. This line of reasoning may be termed as upside down thinking.

The leasehold estate, which is property, consists of the right to enter upon the land and extract the products thereof. The property right to enter upon land and take its produce is a valuable property right and has value independent of the immediate presence of machinery and equipment with which to take and extract the produce of the product. Aside from the presence of equipment, the leasehold has a value which may be determined by many factors, viz.: Is the property proven oil property, and if so, what is its production potential? Has a well been drilled and can it be used? What is the cost of producing the property? Many other factors also enter into *the* question of value.

This leasehold, this property right, this valuable thing was taken from appellee. The fact that there may be no production equipment presently upon the well does not destroy the value of the property taken, that is, the right to enter and reduce the oil to possession and ownership. That right cannot be cast into limbo without compensation to the owner therefor, by the fiction of saying it has no value because there is no present machinery thereon to enable the owner thereof to enjoy the right of removal. That is like saying that real property known to have valuable deposits of coal with shafts already sunk, giving access thereto, has no value because there is presently no mining machinery upon the property.

The oil well had been drilled and was in existence. If there were not one bit of production equipment located

thereon, the leasehold of itself had a market value. It is ridiculous to say otherwise particularly where it is known that machinery could be placed there at any time.

Mr. Crown, the expert, testified that the *leasehold* had a fair market value of $11,000, and that such figure did not include personal property and fixtures then present upon the well. [R. 185.] Even the value of the casing in the well was not taken into consideration upon this valuation. [R. 230.] If such casing could be salvaged, the value of the leasehold would be higher. In other words, Mr. Crown, a qualified expert, gave his opinion of value on the leasehold estate and the rights flowing therefrom alone based upon an oil and gas standpoint only. [R. 262.] Such oil *could be reduced to production* by placing production equipment on the well. Add to this the testimony as to the present value of the production equipment as given by the various experts, and it becomes apparent that the amount of the verdict is fully justified.

Appellant's witness Oliver gave a value to the equipment of $19,846.85 (replacement value). [R. 365.] Appellant's witness Wents, gave the present market value of 4 items about which he was cross-examined, which, when reduced to dollars and cents amount to $13,858.88. [R. 406 to 409.] Appellee Block, who was in the oil well supply and equipment business, gave the present value of the production equipment at $22,000. [R. 139.] The witness Rush gave his opinion of the value thereof as $18,000 and a value [R. 212] excluding casing in

the well, of $12,260. [R. 226.] The witness Rubin, a qualified expert, gave his opinion of the value as $22,000. [R. 178.] These were values as of the date of the taking and *not the salvage value of the equipment ten years* hence. Certainly the jury had the right and duty to take into consideration all of the above factors in arriving at its verdict.

The testimony of the appellant's witnesses alone is sufficient to sustain the verdict.

The witness Wents, on cross-examination, testified as to the market value of 4 items contained on the inventory and a computation of such figure gives the result of $13,858.88. [R. 406-9.] This figure does not include numerous other items of personal property or fixtures contained in the inventory. As above pointed out, the witness Oliver testified the replacement value of $19,846.85. These values were before the jury and properly so.

In so far as the value of leasehold is concerned, appellant's witnesses placed a value thereon of $2,700 (by Wents), and $3,100 by Oliver. Examination of appellant's own evidence [Ex. 8, R. 292-293] discloses the absurdity of such opinion, a fact which the jury no doubt took into consideration. The valuation of the leasehold by appellant's experts was predicated upon future production from the premises resulting in an income return in dollars and cents. Of course the potential income from property is only *one* element of market value. Thus the sole element considered in arriving at market value is

based upon the so-called "value in use" theory. As has been pointed out, this is not the proper criterion.

Accepting, for the sake of argument only, such method of determining reasonable market value, it is clear that appellant's evidence patently discloses the gross undervaluation of the government experts. Examination of Appellant's Exhibit 8 [R. 292], gave the jury an eloquent yardstick with which to measure the weight of the opinions of appellant's expert witnesses. That exhibit discloses that from October, 1940 to September, 1942, a period of two years prior to the government's seizure, the well produced 13,644 bbls. of oil. Giving the oil a value of 80¢ per bbl. (the value placed thereon by the government witnesses) results in a dollar value of $10,915.20. 70% or the sum of $7,640.64 belonged to appellant. Deducting therefrom the government's own figures as to production cost of $1,380 per year, or the sum of $2,760.00 for the two year period, leaves net to the owner of the lease $4,880.00 for the 2 year period. *This is the leasehold estate which the government's witnesses testified* was of the value of between $2,700.00 and $3,315.00, based on potential income for an estimated 10 years of production from the oil well.

Government's Exhibit 8 also furnished a further yardstick for weighing government expert's prognostications. *Subsequent* to September, 1942 (the date of seizure), from October, 1942 to June, 1943, a period of 9 months, the total production was 6,466 bbls. of oil. At the same rate,

the production for one year would be 8,622 bbls. Multiply that figure by 80¢ per bbl. (government's figure on the price of oil) and we get $6,897.60. 70% or the appellant's portion, amounts to $4,828.32. Deduct $1,380.00 for production expense (government's figures) and we have $2,987.32 net to the lessee. *In other words, the property produced in one year net in dollars and cents, nearly as much as the government experts testified as being the value of the production over a period of 10 years.*

Undoubtedly, the jury did not place much credence in the government's experts especially when the government's own evidence discloses such glaring incredibility.

The evidence of Mr. Crown (his opinion of the value of the lease as being $11,000, without production equipment) is more nearly in line with the proven facts of the case, and when taken in connection with the other evidence of value, it is certainly sufficient to justify the verdict in the judgment entered thereon.

Certainly the jury was aware of the fact that the appellant having acquired *both* the fee and the leasehold together with the respective rights flowing therefrom, was quite free to then and there shut down or abandon the well, remove the equipment therefrom and sell or otherwise dispose of such items for the cash consideration upon the open market for something in the neighborhood of $18,000. In fact, it does appear that several oil wells located upon the total area condemned, were shut down by the appellant. [R. 204, 206-207.]

III.

There Was No Authority to Seize Personal Property or Trade Fixtures as of September, 1942.

(A) There is no proof that improvements were a part of the realty, and were legally taken in September, 1942.

(B) The items in question were trade fixtures. This fact may be given consideration as between condemnor and condemnee.

(C) There was no legal or authorized seizure of the personal property, equipment or trade fixtures until October of 1943.

Appellant urges that the "improvements", viz., machinery, trade fixtures and personalty were lawfully taken as of September 28, 1942 for the following reasons:

(1) The "improvements" were fixtures, and

(2) Under the amended complaint filed one year later, such items were brought within the scope of the proceedings as of September 28, 1942.

In one sense, this argument can have little or no decisive bearing upon the main point in issue, in view of the undisputed fact that the equipment, personal property and trade fixtures had substantially the same value on September 28, 1942 as it did on October 12, 1943 (the date of the amended resolution of authority for the taking).

Defendant's position under the issues framed by the pleadings is that there was no authority for the taking of the equipment, etc., under the original resolution of September, 1942, for the reason that the complaint described only "lands"; further, that such authority to take

was not given until October, 1943, under the amended resolution and that consequently, property taken in September, 1942, not described in the resolution or in the complaint was not lawfully acquired until authority therefore was legally given and the property properly described in the complaint.

The trial court admitted testimony of separate value of the equipment, etc. for the above reason. (We have pointed out, however, that such testimony was properly received irrespective of the reason stated by the court.) There being no difference in the value of the property taken under the last resolution as of that date and as of the date of the seizure, to that extent, the question of the date of taking is not material or helpful to the proper decision in this case.

Appellee urges, however, that the trial court was *correct in its reason* for the admission of the questioned testimony.

Appellant seeks to overcome such reason by arguing that the machinery, trade fixtures, etc. were a part of the realty and hence were covered by the original authority to take and the original complaint.

Neither the original letter of authority, the complaint nor the order for possession provided for the acquisition or condemnation of personal property or machinery or trade fixtures. All specifically call for the condemnation of land only.

The amended resolution and the amended complaint specifically describe such items as within the scope of the proceedings.

It would seem clear, therefore, that the present claim that it was the intent from the inception to acquire such items is an afterthought conceived to avoid the possible consequences of the seizure in September of 1942. That such consequences did result see *United States v. Certain Parcels of Land,* 62 Fed. Supp. 1017 (S. D. Cal. 1945).

Paragraph XIV of the amended complaint is quite eloquent of this fact. The allegation is *that an additional amendment would follow if it be ascertained that the items in question were in fact a part of the realty.* When considered along with the fact that *no* such amendment followed either before, during, or after the trial indicates that its purpose was to avoid the consequences which arose from the illegal seizure in the first instance. It furthermore indelibly stamps the *nature* of the questioned property, inasmuch as it *must be assumed* that the appellant did *not* ascertain *or contend* that the questioned items *were in fact a part of the realty* or fixtures.

Nor did appellant offer evidence on this issue, which was a question of fact. See *Bond Investment Co. v. Blakesly,* 83 Cal. App. 696, 257 Pac. 189. Appellant, in its brief, cites pages 92 and 93 of the record as proof on such issue. Examination discloses that the cited portion of the record is nothing more than a statement of the attorney for the appellant during the trial with which appellee's attorney disagreed. *Such statement is not proof of the fact.*

On the other hand, appellee did prove that the equipment in question was movable from the well and that it was customary so to do. [R. 173.] All witnesses treated the property in question, with the exception of the ir-

removable portion of the casing, as personal property. [R. 135, 223, 305.] Thus on the record, the equipment would appear to be personalty. The intent of the lessor and lessee, has been shown, viz., that the property might be removed by the lessee. [R. 97-199.]

Appellant has cited authority which it contends, upholds the proposition that the questioned property is realty. Among the cases cited is *Corelym v. Baker,* 182 Cal. 168, 187 Pac. 417. Examination of that case discloses that the trial court, found certain oil well equipment to be realty. On appeal, the finding was attacked as being uncertain and consequently the case was remanded for a new trial. (See p. 170 of the court's opinion.)

Appellant has cited the cases of *R. Barcroft & Sons Co. v. Cullen,* 217 Cal. 708, 20 P. (2d) 665, and *Cain v. Whiston,* 58 Cal. App. (2d) 738, 137 P. (2d) 479, to the point that although a mechanics' lien attaches *only* to real property, it will attach to an oil rig when the land on which it stands is separately owned and is protected from a mechanics' lien by notice of non-responsibility filed by the land owner. Appellant vitally misconceives the effect of the above decisions in their application to the mechanics' lien law of the State of California.

A mechanics' lien attaches "upon the property upon which they have bestowed labor or furnished materials." (Calif. Code of Civil Procedure, Sec. 1183.) Thus the decision in *Cain v. Whiston, supra,* recognizes that a real property owner cannot relieve "property" or improvements upon which labor or material has been furnished from a mechanics' lien by the filing of a notice of non-respon-

sibility, even though he may do so as to the real estate. *English v. Olympic Auditorium,* 217 Cal. 631. At page 745 of the opinion in the *Whiston* case, the court says:

> "Under the holding in the English v. Olympic Auditorium, Inc., *supra,* respondents were not entitled to a lien upon the oil well itself nor upon the real property involved because of the filing of a notice of non-responsibility, but they were entitled to a lien upon that part of the *improvement,* to which they had contributed labor and materials, which was above the surface of the ground * * * The judgment also enforced a lien upon all 'rig accessories and equipment' being part of this oil well rig. This is erroneous as it includes, or may include, articles and equipment used in the drilling of this oil well which were not a part of the improvement erected by respondents (materialmen and laborers) and in connection with which they had nothing to do." (Parenthesis ours.)

Appellant has also cited *Big Sespe Oil Co. v. Cochran,* 276 Fed. 216. While it is true that this Court affirmed the District Court in the setting aside of a Sheriff's deed on execution on the ground that houses, derricks, tanks and oil wells were real property, that opinion does not disclose the manner of the affixation of said articles, nor whether there was a right of removal of said items. The point was only incidentally involved in the case and is the only case which we have found upholding such theory where the evidence as to the manner of the affixation of said property to the real estate and the intent of the parties does not appear from the opinion.

Appellant has also cited section 7043 of the *California Business and Professions Code,* embracing the licensing

of building contractors, and urges that because such section eliminates an owner or lessee who drills an oil well from the requirement of having a contractor's license, it is indicative that oil well machinery and equipment is realty. This is rather strained reasoning. A building contractor who performs work for others is required to have a license. An owner or a lessee who performs work for himself is not required to have a license and how this provision of law can affect the nature of property as being real or personal property is difficult of discernment. A contractor under the law must have a license whether he builds a building as part of the realty for others, or whether he builds something which is clearly removable from the premises and personalty.

Appellant argues also that the *Public Resources Code of the State of California,* Section 3233, which requires approval of the Oil and Gas Supervisor for removal of any rig, derrick or operating structure upon an oil well, seems inconsistent with the view that such equipment be personal property, and might be said, in the absence of such approval, to be "immovable by law."

Again strange reasoning. Examination of the Public Resources Code discloses that the reason for the requirement referred to is to protect underlying oil stratas and sands from damage or harm by the infiltration of water or other foreign products when an oil well is shut down or abandoned. Indeed the section quoted by its *very terms* contemplates the removal of all such items which can be so removed without damage to the underlying oil structure. In fact, the division of the *Public Resources Code* referred to being Division III, Chapter I is entitled "Oil and Gas Conservation," and contains many require-

ments in both the drilling operation and abandonment of oil wells to accomplish such conservation purposes.

Therefore, having made no proof of the manner of the adfixation, if any, of the equipment to the realty, and it being shown that it was intended to be removed at any time during the existence of the lease, the trial court could not have made a finding that the same was realty. Under the issues raised by the *pleadings,* the burden of proof was on appellant. In this appellant failed.

B.

The Items in Question Were Trade Fixtures.

That the items in question whether affixed or not, were trade fixtures, cannot be doubted. The lessee was permitted to remove *all* equipment placed on the leased property by the terms of the lease under which he held. [R. 97, 199.] Under such circumstances, all such machinery and equipment are trade fixtures even though affixed to the realty.

> "The lease usually contains a clause permitting the lessee to remove all machinery and equipment from the land. The courts hold that all machinery as well as casing in the well were trade fixtures and removable by the lessee within the term." *Summers on Oil and Gas,* p. 276.

The same author on page 644 states

> "it is a well settled rule that casing in wells, derricks, engines and other machinery and appliances placed on the land by the lessee for testing, developing and operating the land for oil and gas purposes,

are trade fixtures." See also, *Thornton Oil & Gas,* Vol. 1 (4th Edition), Section 652.

Churchill v. Moore, 4 Cal. App. 219, 88 Pac. 290;

Midland v. Rudneck, 188 Cal. 265, 204 Pac. 1074.

Appellant argues, however, that in condemnation proceedings such trade fixtures are regarded as a part of the realty for the purpose of making compensation.

In the case of *People v. Church,* 57 Cal. App. (2d) Supp. 1032, 136 P. (2d) 139, the court had under consideration a somewhat similar problem, and in a rather extensive and well reasoned opinion points out that such rule as contended for by appellant is not inflexible. The court states:

> "While then, as noted in the Seagren case (50 F. 2d 333), *supra,* and as we have just observed, an agreement between landlord and tenant that the latter may remove his fixtures, does not in itself govern the situation as between condemnor and tenant, it is apparently held not to follow that the intention of the tenant himself in installing the fixtures *may be disregarded, even* as between *himself and the condemnor of his leasehold interest.* What is condemned, in so far as the tenant is concerned, is his leasehold together with his 'improvements pertaining to the realty.' The position of the condemnor is a different one from that of either the purchaser at a voluntary sale or one seeking to realize on some mortgage or other encumbrance that he may hold on the land, in that a condemnor cannot claim to be acting under any possible misapprehension of the effect of a contract. He has made no contract with those whose property he seeks to take. He, therefore, cannot complain if some attention is paid to the purposes for which

the latter has annexed chattels to the land on any theory that he was not advised of those purposes." (Italics ours.)

The court further states:

"While, however, there are few condemnation cases to be found in the books in which the status of the equipment of filling stations is specifically considered and United States vs. Seagren, *supra,* may be, in some sort, the pioneer case on that specific point, there have been many cases in which machinery originally belonging to a tenant but in some degree attached to the realty has been involved in an eminent domain proceeding in which the leasehold has been condemned. Such a case was Jackson vs. State of New York, *supra.* A similar case is *In re* Mayor of City of New York, 39 App. Div. 589 (57 N. Y. S. 657.) Others will be found reviewed in the note to United States vs. Seagren in 75 A. L. R. pp. 1495 *et seq.* There runs through them the proposition to which we have already alluded, that in a condemnation case the parties do not stand on an equality and that the courts must, therefore, be vigilant to see that no injustice is done the property owner who has no option but to take what is given him. While, therefore, as emphasized in Jackson vs. State of New York, a condemnor will not be allowed at its will to take a tenant's leasehold, surrender to him second hand machinery attached thereto, and pay him only for the value of his term separated from that of his installations, it is not necessarily true, that reciprocally in condemning his leasehold the condemnor can require him to leave machinery which can be readily detached without damage to the property in so far as the purposes are concerned *for which the condemnation is sought.* And as was held *In re* Acquiring Property on North

River, 103 N. Y. S. 908, while in condemning for street purposes land improved with a building erected for a factory it is incumbent on the city to pay for such machinery as has become a part of the building, not even the tenant can require it to pay for such machinery as can be readily removed, and will have a substantial value disconnected from the building. If that be true it is manifest that the condemnor cannot compel the tenant to leave such machinery on the premises."

IV.

No Legal or Authorized Siezure of the Personal Property, Equipment or Trade Fixtures Until October of 1943.

Under the heading that the "improvements were condemned as of September, 1942, under the amended complaint," appellant complains of the refusal of the court to admit into evidence a telegram dated March 26, 1945, from the Assistant Secretary of the Reconstruction Finance Corporation to the Special Assistant to the Attorney General, stating that purpose of the offer was to show the intent of the R. F. C. in adopting the subsequent resolution of October, 1943, as being to ratify prior seizure of the improvements.

If the seizure in September of 1942 was in fact unlawful and without authority, which we believe is evident, we are at a loss to understand how one, and particularly the United States Government, having once committed an unlawful act, can later purge itself thereof by unilateral ratification of its former unlawful act.

Be that as it may, the telegram was clearly inadmissible as containing a bald conclusion of law and as being a self-serving declaration.

The document on its face (see p. 29, App. Br.) states

> "declaration of taking filed in said proceedings has been *properly* construed by Justice as an adoption and ratification of Defense Plant Corporation in taking possession on Sept. 28, 1942, of the property listed in Ex. C of amended petition."

A construction of the Department of Justice placed upon the acts of the Defense Plant Corporation was certainly not competent evidence to go to a jury. The telegram contains nothing more than a statement of an opinion on *a question of law*. It was for the trial court to determine as a *matter of law* whether or not the amended resolution constituted a ratification, and as to whether or not one who commits a wrongful act can unilaterally ratify such act. As to the question of intent, there were many other methods of proving such intent, if proof of intent was admissible or proper under the facts of the case. It was not for the Department of Justice, or attorneys in the case to testify before the jury as to the legality of the acts in question or the legal effect thereof. That would be to permit the jury to determine questions of law based upon opinion evidence as to legality.

The case of *Rollins v. U. S.*, 23 C. Cls. 106, cannot furnish authority for appellant's position. That case involved the existence or non-existence of a fact or whether a certain act had transpired. The decision did not involve the legality or propriety of such acts, or legal construction thereof.

Appellant also argues that the "improvements were condemned as of September, 1942, under the amended complaint."

We have heretofore pointed out that the original letter of authority, the declaration of taking and the original complaint provided *only* for the taking of lands. It was not until October of 1943 that the resolution authorizing the taking of the "machinery and equipment described in Exhibit C" was adopted. [R. 276-7.] It was not until January of 1944 that the amended complaint described the property being taken as "the personal property and trade fixtures" [R. 26], and "all pipe, machinery, appliances, equipment, tanks, structures, tools, supplies and all other property whether real or personal, etc." [R. 27-28.] The lands were taken for the "establishment of a reservoir for the storing and conservation of natural gas." [R. 5-6.]

In a case involving other parties and property in the condemnation proceeding now before this court, the District Court of the Southern District of California, in considering the question as to whether personal property and oil well equipment were lawfully taken, stated as follows:

> "While it is probably true under the broad powers reposed by Congress in the Executive by title II of the Second War Powers Act that the personal property involved in this controversy might have been acquisitioned with the land or acquired as incidental thereto the record evidence before us clearly proves that no such situation existed. As previously adverted to, all of the memorials, instructions of authority and pleadings leading up to and accompanying the acquisition by plaintiff pertain to land and only to land. Nor is there any indication in the resolutions

of the acquiring agency of September 19, 1942 and October 19, 1942, that evince any intention to acquire the personal property in dispute as part of the natural gas storage facility sought through the condemnation proceedings instituted in this court.

"The fair preponderance of the evidence before us establishes, we think, that the present claim that it was the intention from the inception of the project to acquire the personalty, is an afterthought conceived to avoid posible consequence of the seizure of Sept. 28, 1942."

The court further states:

"The sole method chosen to acquire the necessary war facility to which the action in this court relates, was by condemnation proceedings of the judicial type brought as Title II of the Second War Powers Act specifies in accordance with the Act of August 1, 1888, Title 40, Sections 257, 289, U. S. C. A. One of the jurisdictional essentials of a proceeding and condemnation of the judicial type is that the property sought to be taken shall be described in the petition (complaint). See Section 1244, California Code of Civil Procedure.

"It is clearly established by the record before us that no specification whatever of any personalty was made in any of the proceedings until the month of October, 1943, when, for the first time, an authorization to amend the pleadings so as to include personal property, was given, and it was not until the following January that the amended complaint directed to the acquisition of the personal property in issue, was filed.

"Thus we find that the earliest effectual and authorized acquiring of the personal property by the government was subsequent to the acquiring of a

> jurisdiction over the same *res* by the State Court of the recovery actions pending therein. As no other type of authority then judicial has been invoked or applied by plaintiff in the acquisition under consideration, we consider argument and authorities as to the lodgment in the United States of other processes, in eminent domain, as academic and irrelevant to the motion before court." *United States v. Certain Parcels of Land,* No. 62 Fed. Supp. 1017 (S. D. Cal. 1945.)

Appellant states at page 26 of this brief,

> "it would be absurd to suppose that the government is thereby seeking to take possession of only the land and not the well casings, derricks and other operational equipment permanently affixed to it; in fact, it would have been physically impossible to do so."

Such operational equipment was not necessarily essential to the purpose of the use of the lands taken, which was the "establishment of a reservoir for the storing and conservation of natural gas." Derricks, oil well equipment and operational equipment were not essential to such purpose. The gas could be stored in the subterranean channels without the oil producing equipment; in fact, many of the wells taken in the proceeding were actually shut down and were not used. The recital in the memorials and letters or resolutions of authority originally adopted when examined in the light of the purpose of acquiring the lands, we assert, is strong and eloquent evidence of the fact that the resolution of October, 1943, and the amended complaint of January, 1944 were clearly afterthoughts.

Appellant has cited the case of *Shoshone Tribe v. United States,* 299 U. S. 476, 496, as authority for its position that, where the original taking of possession was unauthorized, if it is later approved, the approval relates back to the original date which is then considered as the date of taking for the purpose of compensation.

The cited case does not support the appellant in fact or in law, and did not involve an eminent domain proceeding. That was an action by the Shoshone Tribe against the United States based upon breach of a treaty stipulation formerly made between the Tribe and the United States. In other words, breach of contract. Damages were claimed for such breach and the question was as to the proper date for said damages be fixed. The government contended that the year 1878—the date of the breach—was the proper date for fixing the same. The Shoshone Tribe contended that the proper date for fixing damage was 1927, as that was the date of an Act of Congress giving the court of claims jurisdiction to hear and determine the claim against the government.

The Supreme Court speaking through Justice Cardozo, held that the date of the wrongful act was 1878 and that the damage should be determined as of that time. The decision did not involve the question of taking of possession of the plaintiff's lands by the government but rather the government's violation of its treaty obligation wherein it had agreed to the exclusive use and possession of the Shoshone Tribe of certain lands set aside as reservation. The government, in violation of its treaty obligation, has tacitly permitted the Arapahoe Tribe to occupy the portion of the reservation and had failed to protect the Shoshone Tribe as it had agreed to do. The Arapahoe

people entered into possession in 1878. Thus it appears that the case is not authority for appellant's contention.

Nor do we think that the additional authorities cited by the appellant in support of its position, furnish comfort or authority to sustain that position, as examination thereof will disclose.

Conclusion.

It is therefore respectfully submitted that evidence of market value of the equipment, trade fixtures and personal property was, under the facts of this case, properly admitted; that the verdict and judgment are more than supported by the evidence and that no prejudicial error has been shown by the appellant, which would justify a reversal of verdict and judgment entered thereon. The Judgment should therefore be affirmed.

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